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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1565

SOUTHERN OHIO COAL COMPANY
AND OHIO POWER COMPANY, *Petitioners*

v.

UNITED MINE WORKERS OF AMERICA
UNITED MINE WORKERS OF AMERICA, DISTRICT NO. 6
AND UNITED MINE WORKERS OF AMERICA
LOCAL NOS. 1980, 1886 and 1957, *Respondents*

MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES FOR LEAVE TO FILE A BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES FOR LEAVE TO FILE A BRIEF AMICUS CURIAE

The Chamber of Commerce of the United States of America hereby moves, pursuant to Supreme Court Rule 42(1), for leave to file a brief *amicus curiae* in support of the petition for writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit rendered February 11, 1977. The motion is necessitated by the refusal of respondents to consent to the filing of the appended brief.[1]

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[1] Petitioners have consented pursuant to Supreme Court Rule 42(1).

The interest of the *amicus curiae,* the Chamber of Commerce of the United States, [hereinafter, the Chamber] is set forth in detail in its brief. To summarize, the Chamber of Commerce is the major association of business and professional organizations, both large and small, in the United States. The Chamber has a membership of over 3,700 state and local chambers of commerce and trade and professional associations, and a direct business membership in excess of 65,000.

The erroneous decision of the Sixth Circuit has a major, direct impact on the ability of the Chamber's members to enforce a no-strike pledge, obtained in a collective bargaining agreement, when their employees will not cross an illegal picket line manned by picketers covered by the identical collective bargaining agreement. Moreover, the responsibility of union districts and internationals for acts of their locals is of equally great importance to Chamber members. In addition, the decision of the Sixth Circuit has an indirect effect on the Chamber's members in terms of its effect on the availability of coal, and the impact of that availability on the national energy policy.

The petitioners and the *amicus curiae,* Bituminous Coal Operator's Association, represent solely the coal and power industries. Because both the direct and indirect ramifications of the Sixth Circuit's decision are of national significance to a wide range of industry and business, it is particularly appropriate for this Court to consider the views of a national organization, the Chamber of Commerce, which represents such a diverse group of industry and business, both large and small.

For these reasons, it is respectfully requested that the motion of the Chamber of Commerce of the United States of America for leave to file a brief *amicus curiae* in support of the Petitioners be granted.

Respectfully submitted,

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AMICUS BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

INTEREST OF THE AMICUS CURIAE

The Chamber of Commerce of the United States of America is a federation consisting of a membership of over 3,700 state and local chambers of commerce and trade and professional associations, and a direct business membership in excess of 65,000. It is the largest association of business and professional organizations in the United States.

The Chamber regularly represents the interest of its member-employers in important labor relations matters vitally affecting those interests before the courts, the U.S. Congress and the Executive Branch and independent regulatory agencies of the Federal

government. Such representation constitutes a significant aspect of the Chamber's activities. Accordingly, the Chamber has sought to advance those interests in a wide spectrum of labor relations litigation.[1]

The questions presented in the instant case are matters of continuing interest to the Chamber and its members. First, the case presents the question of whether the district and international levels of a union have any responsibility to prevent or end repeated strikes by local members over arbitrable issues when the international has knowledge of those strikes. Second, the case presents the question of whether this Court's decision in *Buffalo Forge Co.* v. *Steelworkers,* 428 U.S. 397 (1976), precludes the enjoining of a strike in violation of a no-strike clause in a completely different factual context. In particular, whether *Buffalo Forge* precludes the enjoining of a strike where the primary picketers were engaged in an illegal strike, were not employed by petitioner, and where both the primary picketers and petitioners' employees were covered by the identical national collective bargaining agreement.

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[1] *E.g., Buffalo Forge* v. *Steelworkers,* 428 U.S. 397 (1976); *Connell Construction Co., Inc.,* v. *Plumbers and Steamfitters Local Union 100,* 421 U.S. 616; *Gateway Coal Company* v. *United Mine Workers of America, et al.,* 414 U.S. 268 (1974); *William E. Arnold Co.* v. *Carpenters District Council of Jacksonville, etc., et al.,* 417 U.S. 12(1974); *Alexander* v. *Gardner-Denver Co.,* 415 U.S. 36 (1974); *Super Tire Engineering Company, Supercap Corporation and A. Robert Schaevitz* v. *Lloyd W. McCorkle, et al.,* 416 U.S. 115(1974); *N.L.R.B.* v. *Bell Aerospace Company Division of Textron Inc.,* 416 U.S. 267(1974); *Boys Markets* v. *Retail Clerks Union,* 398 U.S. 235 (1970); *N.L.R.B.* v. *Granite State Joint Board,* 409 U.S. 213 (1972); *N.L.R.B.* v. *Pittsburgh Plate Glass Co.,* 404 U.S. 517 (1971); *N.L.R.B.* v. *The Boeing Company, et al.,* 91 S.Ct. 1952 (1973).

The decision of the court below will not only interfere with the ability of Chamber members to enforce a contractual no-strike clause, and the national labor policy of promoting peaceable resolution of labor disputes through the parties' grievance-arbitration machinery,[2] but, by interfering with the supply of coal, will have a major impact on the ability of Chamber members to comply with the national energy policy by converting their operations from the use of oil and natural gas to coal.[3]

REASONS FOR GRANTING THE WRIT*

The Court of Appeals Erred in Refusing to Extend the Injunction to the United Mine Workers District and International.

The District Court found that members of the United Mine Workers District 6 and International, Executive Boards, as well as District 6 safety coordinators, had actual knowledge of the illegal strike activity at Petitioners' mines, and were present for discussions of those work stoppages (A-18a-19a).[4] Moreover, the District Court found that telegrams describing the July-August work stoppage had been sent to the Presidents of the UMW District and International and that pursuant to the UMW constitution, district

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[2] *See Gateway Coal Co.* v. *U.M.W.A.,* 414 U.S. 368, 377 (1974); *United Steelworkers of America* v. *American Mfg. Co.,* 363 U.S. 564 (1960); *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.,* 363 U.S. 574 (1960); *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.,* 363 U.S. 593 (1960).

[3] See the proposed National Energy Act, HR 8444, Title 1, chap 6, part 4, § 601 *et seq.*

[4] "A" references are to the appendix attached to Petitioners' brief.

* The amicus relies on Petitioner's Statement of Facts.

or local autonomy could be suspended to assure performance or enforcement of a collective bargaining agreement (A-19a-20a).

Despite these findings, and its conclusion that injunctive relief was appropriate against the locals, the District Court refused to enjoin either District 6 or the International. The court based this refusal on its conclusion that neither the District nor the International "instigated or provoked the current work stoppage" (A-22a).

On appeal, the Sixth Circuit similarly refused to follow ordinary principles of agency law and hold the District and International responsible for the authorized or ratified actions of its officers and agents (A-33a). The Court admitted that its holding was in direct conflict with that of other circuits[5] (A-33a).

We submit that the Sixth Circuit's decision not only conflicts with those of other circuits but is in direct opposition with the ordinary agency principles to be applied to proceedings such as this pursuant to 29 U.S.C. § 185(b) and (e)[6] as interpreted by this Court.

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[5] *See, e.g., Eazor Express, Inc.* v. *Int'l Brotherhood of Teamsters* 520 F.2d 951, 959-964 (3rd Cir. 1975); *Wagner Electric Corp.* v. *Local 1104, Int'l Union of Electrical, Radio and Machine Workers,* 496 F.2d 954, 956 (8th Cir. 1974); *Vulcan Materials Co.* v. *United Steelworkers of America,* 430 F.2d 446, 455 (5th Cir. 1970), *cert. denied* 401 U.S. 963 (1971).

[6] 29 U.S.C. 185(b) and (e) provide in pertinent part:

> (b) Any labor organization which represents employees in an industry affecting commerce as defined in this chapter . . . shall be bound by the acts of its agents.
>
> (e) For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

United Mine Workers v. *Gibbs,* 383 U.S. 715, 736 (1966).

Moreover, the decision of the Sixth Circuit ignores the realities of the workplace by removing any burden whatsoever from those in the best position to cure admittedly illegal work stoppages, the union district and international, unless the employer can meet the totally unreasonable burden of proving that the district or international instigated or provoked the work stoppage. We suggest that the decision of the Third Circuit in *Eazor Express, supra,* takes a more realistic approach. There the court held that the international had to use all reasonable means to end an unlawful strike begun without their authorization:

> When all the members of a union employed by a given employer engage in a concerted strike not formally authorized by the union . . . [the union is responsible] on the theory that mass action by union members must realistically be regarded as union action. The premise is that large groups of men do not act collectively without leadership and that a functioning union must be held responsible for the mass action of its members. (Citations omitted.) *Eazor Express, supra* at 963.[7]

The instant case provides an even stronger factual basis for application of the principles enunciated in *Eazor*. In this regard, the UMW constitution expressly authorized the international to suspend district or local autonomy in order to assure performance or enforcement of the collective bargaining agreement.[8]

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[7] *See also, Wagner Electric Corp.,* v. *Local 1104 I.U.E., supra,* at 956 (8th Cir. 1974); and *Vulcan Materials Co.* v. *Steelworkers, supra,* at 455 (5th Cir. 1970).

[8] Unlike *Eazor* or *Wagner Electric Corp., supra,* at 956, the international made no attempt to exculpate itself from liability.

This provision demonstrates the international's assumption of responsibility for illegal acts of the local and its members. Moreover, we submit that it must be considered as part of the "consideration" for the employer's entry into the collective bargaining agreement and therefore is enforceable under 29 U.S.C. § 185. Thus, a triple basis is provided for application of the *Eazor Express* result to this case: the common law agency principle of apparent authority,[9] the Third Circuit's presumption that mass action is union action, and the international's assumption of responsibility for enforcement of the collective bargaining agreement.

Clearly, the approach of the Third Circuit better effectuates the intent of Congress in enacting 29 U.S.C. § 185 (*Eazor Express, supra* at 963), and deals with the liability of the international in a realistic manner. In the instant case, the Sixth Circuit has seemingly ignored the continual wildcat strikes in the coal industry, which make it a particularly appropriate industry for application of the "mass action" principle.[10] In any event, whether or not this Court agrees with the holding of the court below, the petition should be granted to resolve the dispute in the circuits and quell the proliferation of litigation on this issue.

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[9] *UMW* v. *Gibbs, supra* at 736 (1966); *Wagner Electric Corp.* v. *I.U.E., supra.*

[10] During fiscal 1975, there were approximately 300 *Boys Markets* injunction cases involving wildcat strikes in the Southern District of West Virginia alone. *Cedar Coal Co. et al.* v. *United Mine Workers et al.*, —— F.2d ——, C.A. 4, Nos. 76-1785, 1793, 1846 and 8239 (July 6, 1977), slip op. at 45. Unofficially reported at Daily Labor Reporter, (DLR) No. 133.

The Sixth Circuit Erred in Not Finding This Case to be Factually Distinguishable from *Buffalo Forge*.

Relying on this Court's decision in *Buffalo Forge Co.* v. *United Steelworkers of America*, 428 U.S. 397 (1976), the Sixth Circuit affirmed the District Court's refusal to find the union in contempt for failure to comply with a previously issued "Boys Markets"[11] injunction. We submit that this case is clearly distinguishable from *Buffalo Forge*, and therefore under *Boys Market*, the Sixth Circuit should have found the union in contempt. Moreover, the Fourth Circuit's recent interpretation of *Buffalo Forge, supra*, in *Cedar Coal Co., et al.* v. *United Mine Workers, et al., supra*, DLR No. 133, is in sharp conflict with that of the Sixth Circuit here. For these reasons, the petition should be granted, at the very least, to resolve the unanswered questions regarding this Court's decision in *Buffalo Forge*.

Southern Ohio Coal and the union are both signatories of the National Bituminous Coal Wage Agreement (A-28a). This agreement contains a grievance-arbitration clause[12] which this Court has previously recognized to be of a broad nature, and to contain an implicit no-strike clause. *Gateway Coal Co.* v. *Mineworkers*, 414 U.S. 368, 376, 384 (1974); *Teamsters Local* v. *Lucas Flour Co.*, 369 U.S. 95 (1962). This

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[11] *Boys Markets, Inc.* v. *Retail Clerks Union*, 398 U.S. 235 (1970).

[12] Article XXIII, § (g) of the agreement provides as follows:

> Should differences arise between the Mine Workers and the employer as to the meaning and application of the provisions of this agreement, or should differences arise about matters not specifically mentioned in this Agreement or should any local trouble of any kind arise at the mine, an earnest effort shall be made to settle such differences at the earliest practicable time.

clause covers not only express provisions of the agreement, "but matters not specifically mentioned in this agreement [and] . . . local trouble of any kind [which may] arise at the mine." The dispute at issue here arose after "stranger" pickets (non-Southern employees) who were members of the union, who were covered by the same national agreement as Southern's employees, and who were engaged in an illegal strike, set up a line around Southern's mine. (A-37a); *see also, Cedar Coal Co.* v. *Mine Workers, supra.*

The facts in *Buffalo Forge* are completely distinguishable from this situation. There, it was stipulated that the primary strike was "bona fide and legal." *Buffalo Forge, supra,* at 403. Moreover, the primary strikers were employed by the same employer as the sympathy strikers and had *no* collective bargaining agreement, let alone being covered by the same agreement. *Buffalo Forge* at 400. Finally, the grievance arbitration clause in *Buffalo Forge* was nowhere near as broad as the one here, since it was limited to disputes arising under the provisions of the agreement and to trouble arising in the plant. *Id.* While here, as previously noted, the grievance-arbitration clause extended to both differences not specifically mentioned in the agreement and to local trouble of any kind.

Moreover, although the Sixth Circuit found that the arbitration clause's reference to settlement of "local trouble" facially covered this dispute, it refused to enjoin the strike on the basis that there was not an express no-strike clause (A-40a). We submit that this holding is directly contrary to *Gateway Coal Co.* v. *Mine Workers, supra,* where the Court held that the broad arbitration clause in this contract's predecessor gave rise to an implicit no-strike clause which was sufficient to justify a *Boys Market* injunction. *Boys Markets, Inc.* v. *Retail Clerks, supra* at 253 (1970).

Further justification for granting the petition sought here is provided by the difficulties encountered by the Court of Appeals in applying this Court's decision in *Buffalo Forge,* and the resulting problems this creates for both employers and unions who are unsure of their legal rights and remedies. These difficulties are demonstrated by the sharp divergence in interpretations of *Buffalo Forge* found in the instant case and in the Fourth Circuit's decision in *Cedar Coal Co.* v. *Mine Workers, supra.*[13]

While the Sixth Circuit refused to look at the underlying cause of the primary strike, the Fourth Circuit stated:

> We think the [Supreme] Court [in *Buffalo Forge*] meant to tie together the non-arbitrability of the underlying cause with the cause of the strike at issue so that, when the underlying cause is not subject to arbitration, a refusal to cross a picket line, generated by a strike over the underlying cause, is not a violation of a no-strike clause which is enforceable by injunction against the strike although it may be by arbitration.
>
> Following *Buffalo Forge,* it seems that where the underlying issue is not arbitrable, then a refusal to cross a picket line set up on account of that underlying issue, although the refusal may be arbitrable, may not be prevented by injunction pending arbitration (footnote omitted) slip op. at 48.

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[13] The collective bargaining agreement in issue here is the same agreement involved in *Cedar Coal, supra.* Moreover, the dispute at *Cedar Coal* is the one which gave rise to the illegal primary pickets in this case. (A-37a)

Accordingly, the Fourth Circuit held that an injunction could issue against sympathy strikers where the underlying purpose was to force the employer to concede an arbitrable issue to the primary strikers who were members of a different local.

The differences in interpretation of *Buffalo Forge* by the Sixth and Fourth Circuits do not end here. The Sixth Circuit totally rejected the contention that *Buffalo Forge* did not apply since Southern's employees would benefit from a favorable resolution of the dispute between the illegal primary pickets and their employer, stating that such a finding would be "highly speculative" (A-38a). The Fourth Circuit, however, in interpreting the identical collective bargaining agreement, found quite the opposite stating:

> We also bear in mind that under the two-tier arbitration provisions of the collective bargaining agreement, Article XXIII, the award in [the Local] 1759 case [which set up the primary line] would affect also Local 1766, for there are only three grounds of appeal to the Arbitration Review Board: that the decision of a panel is in conflict on the same issue with other panels; that the decision involves a new question of a substantial contractual issue; and that the panel decision is arbitrary, etc. slip op. at 57

In view of the foregoing, we submit that this Court should grant the petition here to clarify the scope of its decision in *Buffalo Forge*.

Finally, we note that the net effect of the Sixth Circuit's holdings that the district and international cannot be held liable for actions of the local and its members, and that a Boys Market injunction cannot be obtained under the facts of this case, is severely restrictive. Indeed, in some cases, it practically eliminates the avenues of relief for an employer whose facility is being picketed by illegal stranger pickets, and who also has a contract with his employees containing a broad arbitration no-strike clause and is willing to arbitrate any dispute with them.[14] The untenable position of an employer in such a situation is obvious.[15]

Moreover, we urge the Court to grant the petition here because of the substantial conflict among the circuits as to all three issues presented in this case. The substantial uncertainty presently surrounding these issues can only result in a proliferation of unnecessary litigation. In this same vein, we urge the Court to explicate its *Buffalo Forge* decision. As interpreted by the Sixth Circuit, *Buffalo Forge* destroys the progress that had been made toward effectuating the Congressional preference for peaceful, private resolutions of labor disputes following the decisions of the Court in the Steelworkers Trilogy[16] and *Boys Markets, supra*. Finally, we urge the Court to recognize the continual problem of wildcat strikes[17] in the coal industry de-

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[14] *See* Lowden, "An Analysis of Buffalo Forge," 45 G.W.L.R. 633 (1970).

[15] Petitioner has also presented this Court with the question of whether the Sixth Circuit erred in finding that the prospective restraining order of the District Court was overbroad. We submit that whether or not the order of the District Court was overbroad, the Sixth Circuit's admission of a substantial conflict among the circuits regarding the scope of prospective injunctive relief in *Boy's Market* cases, and its decision to take an admittedly middle ground is sufficient justification for granting the petition here (A-43a—51a). This case presents the Court with the opportunity to resolve this conflict.

[16] *See, supra* n. 2.

[17] *See, supra* n. 10.

spite the existence of broad grievance-arbitration clauses and implicit no-strike clauses. These strikes which shut down substantial portions of that industry have a potentially devastating effect on the nation's energy supply. The implications of these shut downs are of particular significance now that our national energy policy encourages industry to convert from the use of oil to coal.

CONCLUSION

For the forgoing reasons, it is respectfully urged that the petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit be granted.

Respectfully submitted,

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